Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
Canyon Area Residents for Environment	)	
Request for Review of Action Taken Under	)	ET 99-267.
Delegated Authority on a Petition for	)	
An Environmental Impact Statement	)	

To the Commission and Robert Cleveland:

CARE REPLY COMMENTS

INTRODUCTION

The Jefferson County Commissioners have found that the Lake Cedar Group (LCG) proposal does not comply with the Central Mountains Community Plan, the Jefferson County Telecommunications Land Use Plan, the Zoning Regulations, the criteria on visual resources, mountain site design criteria and is incompatible with the neighboring residential use. This local land use authority finding coupled with the numerous public comments filed by the Historic Sites and CARE are prima facia evidence that the LCG proposal "may affect" historic sites and is not in an established antenna farm. The FCC finding to the contrary would be an affront to local land use decision-making and a betrayal of the FCC's stated policy of deferring to local land use decisions.

The "antenna farm" analysis of LCG, BellSouth and the FCC does not apply to compliance with the National Historic Preservation Act. Although CARE addresses the antenna farm categorical exclusion argument of LCG, BellSouth and the FCC, the antenna farm argument applies only to compliance with NEPA, not to compliance with the National Historic Protection Act. Because the FCC has no regulations for implementing the NHPA, CARE

devotes a section to the required steps for compliance with NHPA. The FCC must move forward with its NHPA compliance.

Requirements of the National Historic Preservation Act (NHPA) and recommendations of the Advisory Council on Historic Preservation continue to be ignored. Neither the FCC nor LCG have consulted with CARE as recommended by Don Klima even though CARE voluntarily dismissed its complaint against the FCC and invited the discussions. (ex. 41, 42,43, 44). Native Americans continue to not be consulted. (Ex. 57) The largest structural components impacting this proposal, the 26,500 square foot building, the retaining walls, the transmission bridge and numerous additional antennas, are not even depicted in LCG's visual simulations.

I. THE FCC SHOULD RESPECT JEFFERSON COUNTY FINDINGS

The FCC represents that the FCC defers to local zoning authorities. The last time the FCC looked at environmental impacts in this neighborhood, the FCC Chief of the Video Services Division represented in its published decision that the FCC places great weight on the determinations of local land use authorities, especially in matters of aesthetics. *In re Application of Twenver, Inc. for modification of construction permit of Station KTVD(TV), Denver.* 3 FCC Rcd No. 20 at 5908. (1998) DA 88-1533. That case involved a zoning application by Twenver for a tower site and transmission building on Mt. Morrison. Mt. Morrison is in the CARE area and only a few miles South of Lookout Mountain. The County Commissioners approved Twenver's application for a special use permit authorizing construction on June 22, 1988 after extensive public hearings. Genesee argued that Twenver's construction on the mountain would have an adverse environmental impact on the area. **Twenver argued that the issues raised by Genesee fell within the province of local land use authorities.**

Eleven years ago, Twenver (Channel 20) was seeking to rezone in that 1988 case and now Twenver is one of the 5 TV stations comprising Lake Cedar Group. Lake Cedar Group was given a full opportunity to present its case in the recent hearings before the Jefferson County Commissioners. Twenver is collaterally estopped from now arguing that the FCC can ignore the findings of the Jefferson County Commissioners on the Lake Cedar Group proposal because Twenver is bound by the FCC decision of deferring case to the determinations of local land use authorities on such matters as aesthetics in Twenver's previous case.[1]

This summer, Jefferson County Commissioners specifically issued written findings following numerous public hearings where extensive sworn oral and written testimony was presented to the County Commissioners. (copy provided earlier) The County Commissioners found that the Lake Cedar Group proposal:

> ...**does not substantially conform with the Central Mountains Community Plan because it does not conform to the policy recommendations associated with visual resources, public services/facilities and mountain site design criteria.**
>
> ...**does not substantially conform with the Telecommunications Land Use Plan because it does not conform to the policy recommendations associated with tower siting.**
>
> ...does not meet minimum standards for telecommunications facilities contained in the Jefferson County Zoning Resolution. **The proposal fails to meet these standards because it does not demonstrate that no alternative existing site is available to accommodate the equipment at a reasonable cost or other business terms**, because the proposal does not contain sufficient setbacks, and because the proposal does not demonstrate that the NIER emission levels set forth in the Zoning Resolution are met.
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> That the **proposal is incompatible with residential uses in the surrounding area**. (page 2)

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[1] Under "collateral estoppel" also known as "issue preclusion," once a court has decided an issue of fact or law necessary to its judgment, that decision precludes re-litigation of the issue in a suit on the different cause of action involving a party to the first case. Northern Natural Gas Company vs. Grounds, 931 F.2d 678, 681 (10th Cir. 1991).

Prior to these County Commissioner hearings, on Feb. 24, Senator Allard and Rep. Tancredo wrote a letter on behalf of this community to the FCC Chairman asking questions about this proposal. "Does the Board of Commissioners have absolute authority to deny or grant this request? Does the FCC have any authority to override the decision of the Commissioners in this particular case?" (ex. 45) On March 3, William Kennard, Chairman of the FCC, wrote back to these Congressmen stating, **"The Commission ...defers to the decision of the Jefferson County Commissioners on the remaining local land use matters."** (46)

Even though FCC Chairman promised Senator Allard and Congressmen Tancredo that this was a local zoning matter, LCG now attempts to evade these findings by their arguments to the FCC on antenna farms and alternative sites. A close look at the coverage map submitted to the FCC by LCG shows that LCG actually has better coverage from El Dorado Mountain. (LCG Brown Attachment 4 Sheet 1 and 3). A chart of DTV Service (such as shown in Browne attachment 5 for Squaw) comparing Lookout and El Dorado sites was omitted.

The FCC Advisory Council Local and State Government Advisory Committee urges that local land use decisions be respected and rejects the notion that communities should bear the economic cost of tower sites. The need to keep these decisions local zoning matters is echoed in the FCC Local and State Government Advisory Committee in a number of Advisory Recommendations:

> 7. Local governments should have the ability to reject new tower applications upon findings of adequate existing facilities. The LSGAC has also learned that at times, space on existing towers or buildings may be available for broadcast facilities, but new tower applications may be filed nonetheless, due to unreasonably high rental charges for existing facilities. **The citizens of our cities, towns and counties should not bear the burden of solving the problems caused by unreasonable business practices**. If the Commission continues to seek ways to eliminate the obstacles to digital television rollout, it should consider rules requiring reasonable rent for existing facilities.

> 8. ...The local review process addresses important, legitimate concerns which are not addressed at the federal level. Preemption of local authority should not be considered, especially when the proposal does not include a mechanism for the federal government to assume responsibility for, and adequately address these concerns.
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> 11. Local governments must be allowed to continue to consider all public health, safety and welfare issues, including aesthetics, in deliberations over zoning for television towers, as they are permitted to do with respect to all other structures, including smaller telecommunications facilities.
> Source: FCC Local and State Government Advisory Committee Recommendation Number 8

LCG devotes much space to the "mandate" for high definition television. If Lake Cedar Group were truly open to methods of promptly bringing digital television to the Denver marketplace, LCG would have immediately accepted CARE's invitation to work with them in going to agencies such as the FCC to work out what LCG perceives to be "problems" with alternative sites. (Ex. 41-44)

Digital television could be deployed on Squaw Mountain, El Dorado, numerous sites on the Great Plains and in several other mountain locations without having any negative impact on National Register or National Register eligible sites. LCG argues that the Squaw Mountain site will not work because of the "short spacing" problem of Squaw Mountain. Squaw Mountain is already zoned for a new tower and enormous transmission building but LCG will not consider the site because of the "short spacing" problem of only a few miles of overlap that exists between the Squaw Mountain and Grand Junction antennas. A signal from Squaw Mountain will not go through the higher granite of the continental divide and interfere with signal in Grand Junction. LCG has not yet attempted to work with either CARE or the FCC on requesting a variance from this FCC requirement. (ex. 41-44) Two of the cases cited by LCG allowed such a variance, *WTCN Television, Inc.*, 14 FCC 2d 870 (1968), *Beasley Broadcasting of Philadelphia, Inc.*, 100 FCC 2d 106 (1985). CARE is willing to go to the FCC with Lake

Cedar Group to try to find a solution, but LCG's response indicates total unwillingness to consider alternative sites.

II. FCC'S OWN NEPA REGULATION REQUIRES AN ENVIRONMENTAL ASSESSMENT BE PREPARED BECAUSE THIS FACILITY MAY AFFECT ONE OR MORE HISTORIC SITES

Compliance with NEPA regulations is not compliance with NHPA regulations. (ex. 49) but CARE first addresses the FCC NEPA regulations and shows that not even these regulations are being followed.

A. The test of Section 1.1307(c) has been met. In its Opposition to the letter of June 3, 1999 from the Advisory Council on Historic Preservation ("ACHP"), which the FCC is treating as a petition for reconsideration,[2] LCG states that "no evidence has been presented that shows the proposed LCG tower 'may significantly affect the environment'." Therefore, according to LCG, the categorical exclusion at Note 3 of Section 1.1306 remains unrebutted and a formal Environmental Assessment ("EA") pursuant to Section 1.1311 of the Rules is not required.[3]

Even if this LCG statement were true at the time of initial application for the Supertower, it is no longer valid. The ACHP June 3rd letter, now amplified by comments from the Jefferson County Historical Commission, the City and County of Denver, the Jefferson County

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[2] Public Notice, DA 99-1211, released June 25, 1999.

[3] Opposition, 13. CARE assumes, for the sake of this argument only, that Note 3 operates as a valid categorical exclusion. CARE maintains fully its earlier contentions that (a) the de facto antenna farm on Lookout Mountain is not an established antenna farm, (b) in any event the "Supertower" is dissimilar from the existing antenna structures, and (c) certain antennas found not to comply with Section 1.1307(b) make the categorical exclusion inoperable. Moreover, Note 3 is poorly drafted because it contradicts Section 1.1306(a), which states that issues associated with the topics in Section 1.1307(a) – including historic preservation – make a facility ineligible for categorical exclusion. In CARE's understanding, the purpose of a "Note" is to refine or elaborate upon a rule's text, not to overturn the rule.

Commissioners and others, has moved the ball to LCG's court under Section 1.1307(c) of the Rules. Subsection (c) reads in part:

> If an interested person alleges that a particular action, otherwise categorically excluded, will have a significant environmental effect, the person shall submit . . . a written petition setting forth in detail the reasons justifying or circumstances necessitating environmental consideration. . . . If the [FCC decisionmaker] determines that the action may have a significant environmental impact, the [FCC decisionmaker] will require the applicant to prepare an EA . . .

Throughout the course of this proceeding, CARE has provided in its own petitions a multitude of reasons and circumstances why further environmental consideration is necessary. Within the limits of the ACHP petition relating to Section 1.1307(a)(4), CARE offers below additional testimony from or about Denver Mountain Parks, Buffalo Bill's Museum, Boettcher Mansion, Lariat Trail and Mother Cabrini Shrine. Adding to the evidence of need for an EA are the recent letters of the Jefferson County Historical Society ("JCHS") and the City and County of Denver.

Speaking of Lariat Trail, Buffalo Bill's Grave, Pahaska Tepee and other Lookout Mountain Park sites, JCHS writes:

> Visitors often comment on the insensitive defacement of the beautiful area caused by the antenna farms. RF interference prevents normal use of computers and reliable interactive displays at the Buffalo Bill Memorial Museum. The electronic gate to the museum and grave functions uncontrollably – closing during museum hours, keeping visitors out, and opening after hours, causing the historic site to be vulnerable to vandalism.

Concerning Boettcher Mansion and the adjacent Lookout Mountain Nature Center, JCHS continues:

> Over 200,000 visitors attend this site annually.
> Visiting vehicles lock and unlock uncontrollably. Locksmiths have had to be called to let people into their vehicles.[4]

[4] Letter of July 15, 1999, received at the FCC August 10th.

Writing for the City and County of Denver, the Director of the Buffalo Bill Memorial Museum states:

> These towers have been a source of problems for the Museum [since the first ones were erected.] The initial impact is aesthetic. We do receive complaints from the public and the media, who are appalled to see the transmission towers so prominent in three of the four viewscapes. While the Lake Cedar Group's proposed tower might eliminate some of the existing towers, *it would replace them with a larger, more intrusive structure.* (emphasis supplied)[5]

The Director adds:

> Less obvious to our visitors are the unseen impacts of the towers' presence. Cell phones do not work on much of our site. We have been unable to install certain types of security systems because of the tower interference. We have one VCR unit (used to present programs to visitors which will not function properly in certain areas of the Museum.

The letter goes on to detail problems with a new computer and peripheral equipment which are unresolved despite long hours spent by the manufacturer's technical support staff.

It is no answer to these concerns to say that their connection to the existing Lookout Mountain towers – much less the unbuilt Supertower -- is unproven. Section 1.1307(a)(4) does not require certainty. It asks only for possibilities in the language of "may affect."

B. "May Affect" is not the same as "will affect". Historic preservation is covered by Section 1.1307(a)(4), which, repeating from above with emphasis added, states:

> "(4) Facilities that **may affect** districts, sites, buildings, structures or objects, significant in American history, archaeology, engineering or culture, that are listed, or are eligible for listing, in the National Register of Historic Places."

Notice that the rule reads "**may affect**." That is, if a facility placement "**may affect**" a historic site, an environmental assessment "must be prepared." The parties are entitled to argue about whether a given facility "may affect" a historic site, but the FCC is not allowed to exclude the facility because it is supposedly in an antenna farm. The only way a categorical exclusion could

exist is if there were zero chance that a facility -- in this case, the tower, the antennas, and the 25,600 square foot transmission building -- could have any effect on any historic site. As long as the facility "may affect" the site, Section 1.1306 cannot be used to avoid environmental assessment. The abundant public comments from Denver Mountain Parks (ex. 17), Buffalo Bill's Museum, and others clearly show that there "may" be an impact. A quick overview of these comments follows:

> **Denver Mountain Parks (two time periods).**
> "A major threat to the parks integrity are utility and transmission towers. The mountain parks have several high mountains close to Denver which make them highly desirable for television and radio transmission towers. Several towers exist within a portion of Lookout Mountain Park which harm the scenic and visual character of one portion of that park." [1983, submission by Denver Mountain Parks to the United States Department of the Interior National Park Service].
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> "The Denver Mountain Parks District is on the National Historic Register as a Multiple Properties listing, recognized at the local level. The Lariat Trail Scenic Drive, Buffalo Bill's Grave and Museum, the Pahaska Teepee... and Lookout Mountain Park are all near the proposed transmission facilities. The scenic qualities from Genesee Mountain Park as well as other areas in the Mountain Park system may also be impacted. All of these sites are contributing areas to our National Historic designation." [Superintendent of Denver Mountain Parks - July 21, 1999]. (ex 17)
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> **Buffalo Bill's Museum.** " The existing towers already disrupt our computers and other equipment: the proposed tower will have even greater output."
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> **Boettcher Mansion** The 1917 Boettcher Mansion now experiences so many interference problems from the television and radio towers that they publish an informational flyer to all prospective users of audio and visual equipment. This flyer advises as to the location of the greatest amounts of interference and various measures to try to cope with it. The Jefferson County Lookout Mt. Nature Center shares the parking lot with Boettcher. People parking new Ford Explorers in 2 spaces at that lot have discovered that their engines have locked from the interference that exists now. The vehicles had to be towed from the area. Across from the entry to the Boettcher Mansion is Colorow Point Park owned by Denver Mountain Parks. (ex. 20)
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> **The Lariat Trail Scenic Mountain Drive.** This historic gateway into the Rockies would be marred by the jarring presence of the ugly transmitter building and

[5] Letter of July 19, 1999, also received at the FCC August 10th.

spiked supertower that would mar many views of those on the mountain looking towards the plains.

Mother Cabrini Shrine. The Shrine has an electronic gate that opens and shuts uncontrollably from electronic interference from broadcast towers. Tourists trying to enter and leave are trapped on either side of the gate.

"May" is not the same as "will". May is an auxiliary verb qualifying the meaning of another verb by expressing ability, contingency, liability, possibility, or probability. [United States v Lexington Mill & Elevator Co. 232 U.S. 399, 58 L Ed 658, 34 S. Ct. 337. Also see Ballentines Law Dictionary.]

C. An Environmental Assessment is now due under FCC NEPA Regulations

Once the determination is made that there "may" be an effect, the next step under the FCC's own regulations is for Lake Cedar Group to prepare an environmental assessment. This step has not taken place.

> Sec. 1.1308 Consideration of environmental assessments (EAs); findings of no significant impact.
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> (a) Applicants shall prepare EAs for actions that may have a significant environmental impact (see Sec. 1.1307). An EA is described in detail in Sec. 1.1311 of this part of the Commission rules.
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> (b) The EA is a document which shall explain the environmental consequences of the proposal and set forth sufficient analysis for the Bureau or the Commission to reach a determination that the proposal will or will not have a significant environmental effect. To assist in making that determination, the Bureau or the Commission may request further information from the applicant, interested persons, and agencies and authorities which have jurisdiction by law or which have relevant expertise.
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> Note: With respect to actions specified under Sec. 1.1307 (a)(3) and (a)(4), the Commission shall solicit and consider the comments of the Department of Interior, and the State Historic Preservation Officer and the Advisory Council on Historic Preservation, respectively, in accordance with their established procedures. See Interagency Cooperation--Endangered Species Act of 1973, as amended, 50 CFR part 402; Protection of Historic and Cultural Properties, 36 CFR part 800. In

addition, when an action interferes with or adversely affects an American Indian tribe's religious site, the Commission shall solicit the views of that American Indian tribe. See Sec. 1.1307(a)(5).

(c) If the Bureau or the Commission determines, based on an independent review of the EA and any applicable mandatory consultation requirements imposed upon Federal agencies (see note above), that the proposal will have a significant environmental impact upon the quality of the human environment, it will so inform the applicant. The applicant will then have an opportunity to amend its application so as to reduce, minimize, or eliminate environmental problems. See Sec. 1.1309. If the environmental problem is not eliminated, the Bureau will publish in the Federal Register a Notice of Intent (see Sec. 1.1314) that EISs will be prepared (see Secs. 1.1315 and 1.1317), or

(d) If the Bureau or Commission determines, based on an independent review of the EA, and any mandatory consultation requirements imposed upon Federal agencies (see the note to paragraph (b) of this section), that the proposal would not have a significant impact, it will make a finding of no significant impact. Thereafter, the application will be processed without further documentation of environmental effect. Pursuant to CEQ regulations, see 40 CFR 1501.4 and 1501.6, the applicant must provide the community notice of the Commission's finding of no significant impact.

[51 FR 15000, Apr. 22, 1986; 51 FR 18889, May 23, 1986, as amended at 53 FR 28394, July 28, 1988]

There is enough evidence on the record – including CARE's survey of "blanketing interference" experienced by nearby Lookout Mountain residents – to suggest that existing antennas may be contributing to a hazardous environment of random electronic malfunction. Will the Supertower's doubling of the overall power output to 20 megawatts, in the words of the Buffalo Bill Museum Director, "make a bad situation here on Lookout Mountain much worse?" To answer that question, it is past time to shift the burden from CARE and beleaguered public officials to the broadcasters to show, through a formal EA,[6] that the new structure will not exacerbate environmental phenomena which are at least distressing and may be dangerous.

[6] Pursuant to Section 1.1311(b), "the information submitted in the EA shall be factual (not argumentative or conclusory) . . ." In *First Century Broadcasting,* cited frequently by LCG and

CARE appreciates the FCC's stated willingness to "address any actual interference complaints that are a result of the initiation of the new DTV facilities when the television licensees file their license applications."[7] But actual interference exists now that appears to be attributable to existing antennas. A reasonable inference, on the state of the record at this time, is that the added radiation from the Supertower cannot help and might hurt. It would be better to test that inference now rather than after the new structure is erected.

D. Other Relevant Rules (The citations following were taken from such web sites as www.achp.gov/actintro.html).

Americans with Disabilities Act (ADA)

CARE's presentation of significant interference problems such as malfunctions of wheelchairs(ex. 11) , heart pace-makers, and hearing aides takes on added importance under the requirements of the ADA. Allowing these interference problems to increase to the point that these handicapped people cannot safely visit historic sites such as Buffalo Bill's Museum reverses the principles embodied by the ADA.

> The ADA requires State and local government entities and places of public accommodation to make newly constructed buildings accessible to individuals with disabilities.

Native Americans

Despite CARE's showing that Lookout Mountain is considered a sacred site by several tribes, nearby Native American archeological sites exist (ex. 10) and the fact that 80 acres are to be rezoned, LCG has contacted no tribes and conducted no archeological survey. Attached is the statement from Gordon Yellowman , the Cheyenne and Arapaho NAGPRA Representative who

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Commenter BellSouth, the existence of a categorical exclusion for antenna farms did not stop the Commission from ordering the broadcaster "to submit a showing as to why its modification did not constitute a major environmental action" requiring an EA. 100 FCC 2d 761, 763 (¶4) (1985).

[7] Memorandum Opinion and Order, FCC 99-123, released May 27, 1999, ¶22.

recently visited Lookout Mountain confirming that the LCG proposal may affect significant sacred and cultural sites.

> I am the Cheyenne Native American Graves Protection and Repatriation Act (NAGPRA) and the National Historic Preservation Act (NHPA) Representative for the Cheyenne and Arapaho Tribes of Oklahoma a "Federally Recognized" Tribe. In addition, I am also a traditional religious leader of the Cheyenne. Both the Cheyenne and Arapaho historically lived and maintained their traditional homelands in what is now the State of Colorado. I have personally visited Lookout Mountain on August 24, 1999 and determined that there are traditional cultural properties on Lookout Mountain that have religious and cultural significance to the Cheyenne. The Lake Cedar Group proposed tower and large transmission building may affect this religious and cultural site. Neither the FCC nor Lake Cedar Group contacted the Cheyenne or Arapaho Tribes of Oklahoma. (Ex. 57)

The area described by Mr.Yellowman should be eligible for inclusion in the National Register and the adverse impacts should be taken into account as part of this proposal. This finding has significance in both the NHPA and the American Indian Religious Freedom Act (AIRFA). The latter requires:

AIRFA affirms the right of Native Americans to have access to their sacred places. If a place of religious importance to American Indians may be affected by an undertaking, AIRFA promotes consultation with Indian religious practitioners, which may be coordinated with Section 106 consultation. Amendments to Section 101 of NHPA in 1992 strengthened the interface between AIRFA and NHPA by clarifying that:

> A. Properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register.
>
> B. In carrying out its responsibilities under Section 106, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties described in subparagraph (A). [16 U.S.C. 470a (a)(6)(A) and (B)]. Advisory Council on Historic Preservation web page.

In light of Mr. Yellowman's finding, a thorough archeological and Native American examination of the LCG site should have been conducted before the issuance of a construction permit that included a 26,500 square foot transmission building on virgin land. These steps now must be taken.

When the FCC made its last amendment to the Environmental Rules in 1990, the National Trust criticized the FCC for conducting environmental reviews after the fact because it "neither makes sense nor carries out federal law." *Amendment to Environmental Rules* 67 RR 2d 991.

III. THE LCG FACILITY IS NOT IN AN ESTABLISHED "ANTENNA FARM" AND THE LCG TOWER IS NOT SIMILAR TO OTHERS ON LOOKOUT MOUNTAIN

The antenna farm categorical exclusion language is irrelevant to the FCC requirements under the NHPA but since it impacts NEPA, it is dealt with here. The LCG proposal is not within an established antenna farm. The vast majority of the acreage for the LCG facility is virgin ground that is zoned as agricultural. The balance of the acreage is mountain residential, not industrial. Jefferson County has specifically found that the Planned Development proposal of LCG is incompatible with residential uses in the surrounding area. Only a small subportion is zoned as legal nonconforming. Legal nonconforming uses can be neither expanded nor enlarged under Jefferson County Zoning Regulations. To be consistent with past FCC orders emphasizing the importance of local decision making, the present site must not be "established."

Note 3 cited by Lake Cedar Group is the antithesis of the Congressional mandate to protect historic sites set out in the National Historic Preservation Act and even contradicts the FCC's own stated regulations. This "note" acts as an inverse condemnation of any historic property in the vicinity of an antenna farm because, under the broadcaster's interpretation, they

could take all kinds of actions that would effect or even destroy historic structures in the vicinity of antenna farms and there would be no recourse. This is absurd. Nowhere has Congress authorized the FCC to disregard the Congressional mandate nor has the FCC followed the proper procedures to comply with the NHPA.

Antenna Farms began as official places where the applicants could receive rapid permission from the FAA - because the grouping of towers could improve safety. Allowing "established" antenna farms (designed only to simplify the FAA regulations) to be identical to "*de facto*" antenna farms (that do not have to follow NHPA) exceeds the powers of the FCC. The FCC should address the sites one-by one as in its previous orders concerning tower farms and/or the Environmental Assessment process. Even if the Lake Cedar Group interpretation on antenna farm categorical exclusions were correct, CARE need only show that this site is not in an "established" antenna farm, or (not "and") that the LCG tower, building, etc are not "similar" to others in the so called *de facto* antenna farm. The proposed LCG tower is much bulkier than anything now on Lookout Mountain. No star mounts exist there today. The power to be transmitted is vastly more than off any other tower. Existing transmission buildings are one twentieth the size of the proposed building. High intensity lighting would be used in a residential neighborhood. Twenver , one of the LCG members, argued that tower lighting is environmentally significant if it is both high intensity and located in a residential neighborhood *In re Application of Twenver, Inc. for modification of construction permit of Station KTVD(TV), Denver*. 3 FCC Rcd No. 20 at 5908. (1998) DA 88-1533.

IV. VIOLATION OF NATIONAL HISTORIC PRESERVATION ACT RULES

Neither the FCC nor LCG can apply the "antenna farm" exclusion to compliance with the NHPA. Don Klima's letter deals with the NHPA, not the Environmental Protection Act. Note 3

has never been approved for the NHPA. The FCC has no NHPA regulations and has not even begun to comply with the requirements of the NHPA. The requirements of the NHPA are more detailed than NEPA in this situation. The same concerns of adverse impact raised by CARE under the NEPA analysis apply here and will not be repeated.

A. FCC Has No NHPA Regulations.

The FCC does not have regulations or guidance on compliance with Section 106 of the National Historic Preservation Act (NHPA). (Ex. 54) Section 110 of the Act, as amended in 1992, outlined a broad range of responsibilities for Federal agencies. Section 110 calls for Federal agencies to establish preservation programs, commensurate with their mission and the effects of their activities on historic properties, that provide broadly for careful consideration of historic properties and the designation of qualified Federal Preservation Officers to coordinate their historic preservation activities. The FCC has not complied. The FCC took action only after receiving the ACHP Don Klima June 3rd letter and then improperly advised the public that this was an antenna farm and so was not eligible for NHPA protection.

The fact that the FCC has published regulations on NEPA does not satisfy the requirements of NHPA.

> Federal agencies have responsibilities under a number of laws that may influence the way they carry out their Section 106 duties. Section 800.14 of the Council's regulations specifically encourages coordination of Section 106 responsibilities "with the steps taken to satisfy other historic preservation and environmental authorities...." However, compliance with one or more of the other statutes does not substitute for compliance with 36 CFR Part 800, unless the Council explicitly agrees that it does through execution of a Programmatic Agreement or approval of counterpart regulations. (Ex. 55 Advisory Counsil Web page http://www. achp.gov/relationship.html)

The antenna farm "exclusion" for NHPA purposes has not been officially proposed as a regulation or explicitly agreed with the execution of a Programmatic Agreement or approval of

counterpart regulations. "The most important thing to bear in mind is not to confuse the requirements of NHPA with the requirements of NEPA, or try to substitute compliance with one for compliance with the other." (ex. 55) Despite this caution, LCG, BellSouth and the FCC have made exactly this mistake.

B. Required Multistep Process not Followed.

The NHPA requires the FCC to comply with a multistep process. The Revised Section 106 Regulations Flow Chart came into effect on June 17, 1999 and must thereafter define the progress of this action [Ex. 56 See :http://www.achp.gov/regsflow.html.]. LCG even admits, " for the purposes of this argument, we will assume that this proceeding is a "case in progress" and that ACHP's new rules govern the obligations of the FCC under Section 106. " [footnote 11 p.16 of their August 23 filing.]The FCC issued its first Public Notice on June 25, 1999 (DA-1211).

Comparison of the ACHP flow chart to the present status of this case shows that the FCC and broadcasters have not clearly followed these steps and are taking actions out of sequence. The FCC improperly stopped processing this matter at Step One or Two using the antenna farm NEPA analysis. Section II addressed the error of the FCC actions under their own NEPA regulations. In this section, the FCC actions on LCG are compared to the required sequenced steps under the NHPA.

1. FCC Stopped at Step One - Initiate Section 106 Process. Establish undertaking and involve the public.

Establish undertaking. [(800.3(a))] On December 6, 1998, the FCC sent notification to Jefferson County that the FCC had already granted LCG Application for construction permits. This was done even though the Lookout site was still not in compliance with the FCC recommended radiation standards and CARE's Application for Review of FCC Staff Action was still pending and undetermined. Although the NHPA does not make an exception for the

licensing of towers and antennas in so-called antenna farms and the FCC has no regulations on the NHPA, the FCC used the "antenna farm" as a reason to not take the construction applications through the required 106 process. A detailed analysis of the "antenna farm" is presented in Section II and III. Clearly, the licensing of these construction permits was a Federal undertaking.

> Section 800.16(y), Undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those requiring ...a Federal permit, license or approval; or there is an undertaking but it does not have the potential to cause effects on historic properties, there are no further obligations under Section 106 or the Council's regulations.

Plan to involve the public. [36 CFR Part 800.3]

June 25, 1999 is the first time the FCC invited public comments with the chilling warning that the area was excluded from the Historic Preservation Act because it was in an established antenna farm. LCG interprets this action as a finding of no historic properties affected. Although Jefferson County and Denver Mountain Parks own several of the properties on the National Register of Historic Properties, neither one was invited by the FCC to be a consulting party despite the following statutory requirements.

> (e) Plan to involve the public. In consultation with the SHPO/THPO, the Agency Official **shall** plan for involving the public in the section 106 process. The Agency Official shall identify the appropriate points for seeking public input and for notifying the public of proposed actions, consistent with Sec. 800.2(d).
> (f) Identify other consulting parties. In consultation with the SHPO/THPO, the Agency Official shall identify any other parties entitled to be consulting parties and invite them to participate as such in the section 106 process. The Agency Official may invite others to participate as consulting parties as the section 106 process moves forward.
> (1) Involving local governments and applicants. **The Agency Official shall invite any local governments or applicants that are entitled to be consulting parties under Sec. 800.2(c)**.4 (4) Representatives of local governments. A representative of a local government with jurisdiction over the area in which the effects an undertaking may occur is entitled to participate as a consulting party.
> (e)The Agency Official (FCC) must decide early how and when to involve the public in the Section 106 process. A formal "plan" is not required, although that

might be appropriate depending upon the scale of the undertaking and the magnitude of its effects on historic properties.

2. Step Two-Determination that undertaking "may" have an affect

The next step is for the FCC to determine that the undertaking might have an affect. The FCC now appears to be reconsidering whether the undertaking might have the potential to affect historic properties. Until this step is completed by the FCC and announced to the public, proceeding through the balance of the steps is premature. There has been no agreement between the consulting parties to process Sections. 800.3-6 all at once and such an agreement at this time would not give the public an adequate opportunity to express their views. If the FCC still insists that there is no potential affect on historic properties because this undertaking is in an antenna farm, CARE then has the right to take this matter up to the Federal Court of Appeals as a final decision. CARE specifically reserves the right to address all other issues when they are properly processed by the FCC in accordance with the ACHP Flow Chart. These other issues remaining for FCC processing after the FCC has changed its determination or the Federal Court of Appeals remands this matter for further proceedings would be set forth in the remained steps.

> 800.3 (g) Expediting consultation. A consultation by the Agency Official with the SHPO/THPO and other consulting parties may address multiple steps in Secs. 800.3-800.6 where the Agency Official and the SHPO/THPO agree it is appropriate as long as the consulting parties and the public have an adequate opportunity to express their views as provided in Sec. 800.2(d).

3. Step Three. Identify properties that may be affected.

Once the FCC has determined that the undertaking does have the potential to cause effects on historic properties, the FCC proceeds to identify properties that might be affected. The FCC is not allowed to put this burden on others. The FCC must make a reasonable and good

faith effort to identify historic properties (800.4(b)). Just because Mr. Klima only listed the Lariat Trial, Boetcher Mansion and Buffalo Bill's Museum does not exhaust the identity of properties that may be affected. Mr. Klima, CARE and others have provided information to help the FCC identify some of the properties but that does not absolve the FCC from responsibility. Other National Register eligible properties include the site itself and the surrounding plat, due to its association with Frederick Law Olmstead and Frederick Law Olmstead, Jr., who designed Central Park in New York. The area of the proposed Supertower was designed by the Olmsteads as a mountain resort community and is today zoned Mountain Residential and Mountain Agricultural. The proposed tower and supporting building require a rezoning to industrial use, a clear change from the existing land use and a move further away from the intent of the Olmsteads.

Lookout Mountain has a number of other National Register-eligible properties that would have their viewscapes impacted by the proposed tower. (Ex 13,14,16) The Golden Historic properties were completely omitted by both the FCC and LCG. (Ex. 21-30, 48-53) There is a potential of the tower structure having a direct and deleterious impact upon those properties. However, the FCC has not adequately surveyed the area to allow such a determination

> 800.4(b)(1) The standard for identification is a "reasonable and good faith effort" to identify historic properties, depending on a variety of factors (including, but not limited to, previous identification work). Appropriate identification may include background research, consultation, oral history interviews, sample field investigation, and field survey.
>
> 800.4(b)(2) Phased identification may be done when alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, and the nature of the undertaking and its potential scope and effect has therefore not yet been completely defined. Final identification and evaluation may also be deferred if provided for in an agreement with the SHPO/THPO or other circumstances. Under this approach, Agency Officials are

required to follow up with full identification and evaluation once project alternatives have been refined or access has been gained to previously restricted areas. Any further deferral of final identification would complicate the process and jeopardize an adequate assessment of effects and resolution of adverse effects.

4. Step Four-Determine if historic properties are affected (800.4(d)(2).

The FCC must proceed to the assessment of adverse effects where it finds that historic properties **may** be affected or the SHPO/THPO or Council objects to a no historic properties affected finding. The agency must notify all consulting parties and invite their views.

5. Step Five. Assess adverse effects to historic properties. (800.5(d)(2))

The determination of an adverse effect is far more encompassing than LCG's August 23, 1999 filing at page 16,17 states. All of the following are adverse effects under 800.5(d)(2) and sections that are particularly applicable in light of the filings from Denver Mountain Parks, Buffalo Bill's Museum, Mt. Vernon County Club, Mother Cabrini Shine, CARE, and other are highlighted in bold text:

> (1) Criteria of adverse effect. An adverse effect is found when an undertaking **may** alter, **directly or indirectly**, the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, **setting,** materials, workmanship, **feeling,** or **association.**
>
> Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. **Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.**
>
> (2) Examples of adverse effects. Adverse effects on historic properties include, but are not limited to:
>
> (i) Physical destruction of or **damage to all or part of the property;**
>
> (ii) Alteration of a property, including restoration, rehabilitation, **repair, maintenance,** stabilization, hazardous material remediation and **provision of handicapped access,** that is not consistent with the Secretary's Standards for the Treatment of Historic Properties (36 CFR part 68) and applicable guidelines;

(iv) **Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance;**
(v) **Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features;**

800.5(a) The SHPO/THPO, and **Indian tribes and Native Hawaiian organizations attaching religious and cultural significance to identified properties, must be consulted when agencies apply the criteria of adverse effect.** The Agency Official also needs to consider the views of consulting parties and the public.

6. Step Six. Resolve Adverse Effects . [(800.6 (b)(1)]

A finding of adverse effect requires further consultation on ways to resolve it.

[800.6(b)(1)] When resolving adverse effects without the Advisory Council for Historic Preservation, the FCC consults with the State and Tribal Historic Preservation Officers and other consulting parties to develop a Memorandum of Agreement. If this is reached, the agreement is executed between the Agency Official and the SHPO/THPO and filed with required documentation with the Council. This filing is the conclusion of the Section106 process and must occur before the undertaking is approved.

If an agreement is not reached, the next step is triggered:

Step 7. Council comment and agency response

800.7(a)(1) The head of the FCC or an Assistant Secretary or officer must request Council comments when the FCC Official terminates consultation. Section 110(l) of the NHPA requires the FCC to document their decision when an agreement has not been reached under Section 106.

800.7(a)(2) The Council and the FCC Official may conclude the Section 106 process with a Memorandum of Agreement between them if the SHPO terminates consultation.

800.7(b) The Council may provide advisory comments even though it has signed a Memorandum of Agreement. This provision is intended to give the Council the flexibility to provide comments even where it has agreed to sign an MOA. Such comments might elaborate upon particular matters or provide suggestions to the FCC for future undertakings.

800.7(c) The Council has 45 days to provide its comments to the head of the

agency for a response by the agency head. When submitting its comments, the Council will also provide the comments to the Federal Preservation Officer, among others, for information purposes.

800.7(c)(4) This section specifies what it means to "document the FCC head's decision" as required by Section 110(l) when the Council issues its comment to the agency

As shown by these citations, the necessary process for FCC compliance with the NHPA has only just begun at this point.

IV. "FACILITY" INCLUDES MUCH MORE THAN A TOWER

LCG has submitted computer simulations from the perspective of only a few of the historic sites that only show the proposed tower. Tricks such as picking the simulation from Buffalo Bill's Grave at a point with a tree blocking much of the tower demonstrate the lack of good faith, as does the omission of the balance of the facility. The FCC mandates that the total facility must be considered. *In the Matter of the Implementation of the National Environmental Policy Act of 1969.* 56 FCC 2d at 639.(1975) Since the largest structural components impacting this proposal, the 26,500 square foot building, the retaining walls, the transmission bridge and numerous additional antennas, are not depicted anywhere in LCG's submissions, what was depicted by LCG is the maximum LCG could place. At best for LCG, the FCC and State must bar LCG from erecting a transmission building or anything else not depicted by LCG.
The retaining walls and transmitter building would create a mass almost five stories high. (See CARE August 23, 1999 submission for simulation) The plans call for numerous antenna, dishes, etc on the roof and night lighting. This would be the largest structure on the Mountain backdrop of the entire Denver Metro area and visible to hundreds of thousands of people. The current plans call for a 25,600 square foot transmission building, with an even larger concrete pad and

the same tower. This is a massive building that will be lit at night and visible in much of Golden and the surrounding plains as well as the mountain since it is near the ridge top of Lookout Mountain. On June 29, 1999 Architect Andy Beck testified before the Jefferson County Commissioners that this architecture does not blend with the natural surroundings as required by Jefferson County's Central Mountain Community Plan. (ex.4) Architect Beck (who restored the Old Faithful Inn at Yellowstone (ex 6)) showed that the architecture of this building is strip mall and cheap motel architecture (ex. 1,2,3) that makes the building highly visible and is not in harmony with mountain architecture.

The proposed LCG building will be six times the size of any comparable building on Lookout Mountain. In fact it will be larger than any other business, home or public building on the front of Lookout Mountain. Its architecture will not be in keeping with its natural or historical surroundings. CARE submitted actual photos showing the location of the Channel 4 tower to show the location where the huge transmission building would be placed. The tower impacts viewscapes for the following National Register sites on or near Lookout Mountain: Boettcher Mansion, Buffalo Bill Museum and Grave/Lookout Mountain Park, Lariat Trail Scenic Drive, Genesee Mountain Park, and many National Register sites in Golden. (Ex. 48-53) It will have larger, and more prominent, guy wires, more antenna arrays. The proposed tower will double existing radiation from 10 million watts to 20 million watts. The proposed supertower complex represents a massive change in appearance and broadcasting strength. If allowed it will set a precedent of replacement allowing larger, more powerful and more unattractive towers to replace existing towers.

CONCLUSION

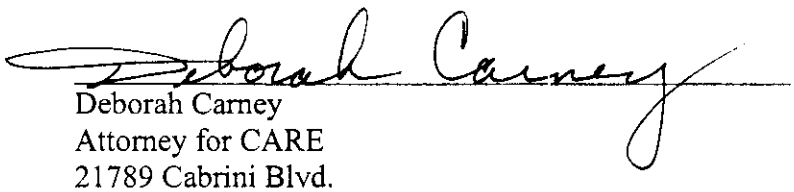
The FCC violated the NHPA and its own regulations when it issued the construction permit for LCG. It is time for the FCC to follow the NHPA and abandon the misplaced reliance on the antenna farm exclusion. Proper compliance with NHPA will take time and adherence to the flow chart. (Ex. 56) The public, Denver, Jefferson County and Native Americans, Interested Parties and all others who have filed public comments need to be notified and invited to comment without being improperly told that their comments will be ignored due to the antenna farm exclusion. The proper action is for the FCC to now determine that the LCG undertaking might have an affect on historic sites and announce this finding. A determination otherwise could not stand the test of review.

Under the FCC NEPA requirements, the FCC should now order LCG to pay for a full scale Environmental Assessment. Archeologists and Native American representatives should be allowed to carefully examine the site.

After the FCC determines under the NHPA rules that the LCG proposal might have an affect on historic sites, the FCC must identify historic properties that might be affected and only then should the FCC proceed to an evaluation of adverse affects using the definitions of adverse effects of the NHPA rather than the evaluation offered by the broadcasters. The FCC should show respect for the opinions of the Jefferson County Historical Society, the managers of the historic sites, the Native Americans and the findings of the Jefferson County Commissioners. To do otherwise would be to violate the law. To follow the urgings of LCG and BellSouth would be to violate the FCC promise to respect local land use decisions.

Finally, the FCC should follow Mr. Klima's advice and CARE's offer and consult with CARE. Digital Television can be deployed in Denver without violating the laws or local land use decisions.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Deborah Carney, do hereby certify that a copy of the above pleading was served by first class mail, U.S. postage prepaid, this ninth day of September, 1999 to the following:

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